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BEFORE THE ARIZONA CORPORATION COMMISSION

26

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

In the matter of:

YUCATAN RESORTS, INC.,

3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

YUCATAN RESORTS, S.A.,

3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
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**RESORT HOLDINGS INTERNATIONAL,
INC.,**

3222 Mishawaka Avenue
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
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DOCKET NO. S-03539A-03-0000

**SECURITIES DIVISION'S OBJECTION
TO RESPONDENT'S JOINT MOTION
TO (i) PRECLUDE TESTIMONY FROM
GARY KIRST AND (ii) PROHIBIT GARY
KIRST FROM COMMUNICATING
WITH PROSPECTIVE WITNESSES FOR
THE DIVISION**

AZ CORP COMMISSION
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CAK

1 **WORLD PHANTASY TOURS, INC.,**)
 2 **a/k/a MAJESTY TRAVEL**)
 3 **a/k/a VIAJES MAJESTY**)
 4 Calle Eusebio A. Morales)
 Edificio Atlantida, P Baja)
 APDO, 8301 Zona 7 Panama,)
 5 **AVALON RESORTS, S.A.**)
 6 Av. Coba #82 Lote 10, 3er. Piso)
 Cancun, Q. Roo)
 Mexico C.P. 77500)
 7 **MICHAEL E. KELLY and LORY KELLY,**)
 8 husband and wife,)
 29294 Quinn Road)
 North Liberty, IN 46554;)
 3222 Mishawaka Avenue)
 South Bend, IN 46615;)
 P.O. Box 2661)
 South Bend, IN 46680,)
 Respondents.)

I. Introduction

The Securities Division of the Arizona Corporation Commission ("Securities Division") objects to the Respondents', Resort Holding International, Inc., Resort Holding International, S.A., Yucatan Resorts, Inc., Yucatan Resorts, S.A. and Michael Kelly (collectively, the "Respondents"), Joint Motion to (i) Preclude testimony from Gary Kirst and (ii) Prohibit Gary Kirst from Communicating with Prospective Witnesses for the Division ("Motion to Preclude and Prohibit"). The Securities Division requests that the Motion to Preclude and Prohibit be denied and dismissed for any of the following four reasons. First, the presiding Administrative Law Judge ("the ALJ") already ruled on Respondent's request to exclude witnesses by granting the request but specifically permitting Gary Kirst ("Kirst") to remain present during the hearing. Second, the Commission and the ALJ may apply technical rules of evidence with discretion in accordance with governing law and such application would exempt Kirst from exclusion under Rule 615 of the Arizona Rules of

1 Evidence. Third, according to case law, an investigative officer should be permitted to remain
2 present during an adverse proceeding despite the fact that the investigative officer will be a witness
3 in the adverse proceeding. Finally, regardless of the exception from exclusion for investigative
4 officers, Respondents have failed to show that prejudice would result from the ALJ's refusing to
5 exclude Kirst.

6 **II. Discussion**

7 1. THE RESPONDENT'S MOTION SHOULD BE DENIED BECAUSE THE ALJ
8 ALREADY RULED THAT KIRST IS NOT SUBJECT TO EXCLUSION.

9 The ALJ ruled on Respondent's request to exclude witnesses at the prehearing conference
10 held on March 28, 2005. The Division had no objection to the Respondent's request to exclude
11 witnesses except that the Division requested that Gary Kirst ("Kirst") not be excluded; the ALJ
12 granted the Division's request that Kirst not be excluded and overruled the Respondent's objection to
13 the Division's request. The hearing started on March 29, 2005; Kirst was present. A week later,
14 Respondents filed their Motion to Preclude and Prohibit on April 4, 2005, citing a case laying out the
15 appellate standard for a blanket refusal by a judge to honor an exclusionary request. Motion to
16 Preclude and Prohibit, p. 3. The case cited is not applicable to the facts at hand, and the issue is not
17 ripe for review under the standard cited because an order has not been entered nor approved by the
18 commission. The ALJ has already ruled that Kirst is not subject to exclusion, and since
19 Respondents' have not cited any applicable reason to reverse that ruling, the Respondent's Motion to
20 Preclude and Prohibit should be denied.

21 2. THE RESPONDENT'S MOTION SHOULD BE DENIED BECAUSE ADHERENCE TO
22 THE RULES OF EVIDENCE ARE NOT REQUIRED IN THE ADMINISTRATIVE
23 PROCEEDING

24 A.R.S § 41-1062(A) states:

25 Unless otherwise provided by law, in contested cases the following shall apply:
26

- 1 1. A hearing may be conducted in an informal manner and without adherence to the
2 rules of evidence required in judicial proceedings. Neither the manner of
3 conducting the hearing nor the failure to adhere to the rules of evidence required
4 in judicial proceedings shall be grounds for reversing any administrative decision
5 or order providing the evidence supporting such decision or order is substantial,
6 reliable, and probative. Irrelevant, immaterial or unduly repetitious evidence shall
7 be excluded. Every person who is a party to such proceedings shall have the right
8 to be represented by counsel, to submit evidence in open hearing and shall have
9 the right of cross-examination. Unless otherwise provided by law, hearings may
10 be held at any place determined by the agency.

11 (Emphasis added. Therefore, Respondents' citation to Evidence Rule 615 as mandating Mr.
12 Kirst's exclusion is plainly erroneous. Adherence to the rules of evidence is not required in
13 this, or any other administrative proceeding. As the only basis that Respondents cite for Mr.
14 Kirst's exclusive is Rule 615, they thus have no legitimate reason for his removal.

15 3. EVEN IF RULE 615 WERE APPLICABLE, THE COMMENTS TO THE
16 RULE MAKE IT CLEAR THAT INVESTIGATORS DO NOT FALL UNDER ITS
17 PROVISIONS.

18 An officer or employee of a party which is not a natural person designated as its
19 representative by its attorney, or a person whose presence is shown by a party to be essential to the
20 presentation of the party's cause is not subject to Rule 615, which otherwise excludes witnesses so
21 they cannot hear the testimony of other witnesses. Rule 615, Ariz. R. Evid. (West 2005). The
22 Author's Comments to Rule 615 give an example of the exception, "Thus, even though an exclusion
23 order has been requested and made, the Court can permit one side's expert witness to hear or review
24 the testimony of the opposing side's expert in order to be in a position to suggest areas for cross-
25 examination." *Id.* (citing *McGuire v. Caterpillar Tractor Co.*, 151 Ariz. 420, 728 P.2d 290 (App.
26 1986)).

 The Federal Rule for excluding witnesses predates the Arizona Rule 615 and contains
identical language in the exception from exclusion. The federal legislative history for the rule states:

1 Many district courts permit government counsel to have an investigative agent at the
2 counsel table throughout the trial although the agent is or may be a witness. The
3 practice is permitted as an exception from the rule from exclusion.... The
4 investigative agent's presence may be extremely important to government counsel,
5 especially when the case is complex or involves specialized subject matter. The agent,
6 too, having lived with the case for a long time may be able to assist in meeting trial
7 surprises where the best-prepared counsel would otherwise have difficulty. Yet it
8 would not seem the Government could meet the burden under rule 615 of showing that
9 the agent's presence is essential.... This problem is solved if the investigative agents
10 are within the group specified under the second exception made in the rule, for "an
11 officer or employee of a party which is not a natural party designated as its
12 representative by its attorney." Joseph M. Livermore, Arizona Practice Series, Law of
13 Evidence, Rule 615, 4th Ed., 263-265 (West 2005) citing Senate Comm. On Judiciary,
14 Federal Rules of Evidence, S.Rep. No. 1277, 93d Cong., 2d Sess., p. 26 (1974); 1974
15 U.S. Code Cong. & Ad.News 7051, 7072.

16 The Arizona Supreme Court held that although a trial court granted a defendant's
17 motion to exclude witnesses from the courtroom, the trial court did not error in allowing an
18 investigating officer and witness to remain in a courtroom at the prosecutor's table. *State v.*
19 *Hanshe*, 105 Ariz. 396, 466 P.2d 1, supp on other grounds 105 Ariz. 529, 468 P.2d 382
20 (1970). "It is generally advisable in a criminal case that the county attorney have the
21 prosecuting witness at hand so that he may, from time to time, question him in regard to the
22 facts of the case in order that it may be properly presented to the jury, and such is the almost
23 universal practice of this State." *Id.* at 399 quoting *In State v. Armenta*, 98 Ariz. 152, 402
24 P.2d 571 (1965). Indeed, overwhelmingly appellate courts have upheld courts permitting an
25 investigative officer to remain in court despite the fact that the investigative officer will be a
26 witness. *Enoch v. Gramley*, 70 F.3d 1490 (7th Cir. 1995); *United States v. Adamo*, 882 F.2d
1218 (7th Cir. 1989); *United States v. Jones*, 687 F.2d 1265 (8th Cir. 1982); *United States v.*
Infanzon, 235 F.2d 318 (2d Cir. 1956); *Portomene v. United States*, 221 F.2d 582 (5th Cir.
1955); *Powell v. United States*, 208 F.2d 618 (6th Cir. 1953); *United States ex rel. Jacques*

1 Hilton, 423 F. Supp. 895 (D. N.J. 1976); *Via v. Peyton*, 306 F. Supp. 1153 (D. Va. 1969);
2 *Jones v. United States*, 252 F. Supp. 781 (W.D. Okl. 1966); *Condon v. State*, 597 A.2d 7
3 (1991); *Jackson v. State*, 233 Ga. 529, 212 S.E.2d 366 (1975); *Bruce v. State*, 259 Ga. 798,
4 387 S.E.2d 886 (1990) (holding trial court did not abuse discretion in allowing investigator to
5 remain present despite request to exclude witnesses).

6 The Commission has the authority to conduct investigations to determine whether the
7 Securities Act of Arizona has been violated and to employ investigators within the Securities
8 Division who are commissioned peace officers to aid in the task. A.R.S. § 44-1813 and § 44-
9 1822. Kirst is an investigator who is a commissioned peace officer within the Securities
10 Division employed to investigate whether the Securities Act of Arizona has been violated.
11 Kirst has been involved with the matter involving the Respondents since its inception. Kirst is
12 well versed in the facts of this case. Case law supports finding that Kirst should be allowed to
13 remain present during the hearing despite the fact that he will be called as a witness.
14

15
16 4. RESPONDENTS HAVE NOT MET THE BURDEN OF SHOWING PREJUDICE
17 WOULD RESULT FROM THE ALJ'S REFUSAL TO EXCLUDE KIRST FROM THE
18 HEARING.

19 In an administrative proceeding the court will not disturb the trier of fact's decision without a
20 showing of prejudice. *Plowman v. Arizona State Liquor Board*, 152 Ariz. 331, 732 P. 222 (1986).
21 Although Respondents quote *State v. Roberts* for the holding, "Failure to honor an exclusion request
22 is presumed prejudicial unless the absence of prejudice is clearly manifest from the record,"
23 Respondents fail to mention that *State v. Roberts* laid out a standard for appellate review. *State v.*
24 *Roberts*. 126, Ariz. 92, 94, 612 P.2d 1055, 1057 (1980). Respondents also fail to mention that *State*
25 *v. Roberts* was limited by later case law. See *State v. Perkins*, 141 Ariz. 278, 294, 686 P.2d 1248,
26 1264 (1984). Although neither case discusses a witness who fits within an exception to the rule to

1 exclude witnesses, in *State v. Perkins*, the Supreme Court of Arizona states that the presumption of
2 prejudice from *State v. Roberts* applies to situations where a trial court completely refuses to honor
3 an exclusionary request. In the present case, the Respondent's request was granted; Kirst, considered
4 an exception from the rule, was permitted to remain present during the hearing. Respondents filed
5 their Motion to Preclude and Prohibit mid-hearing, not immediately after the ALJ ruled on the issue
6 and not at the appropriate time according to the case law, on review. Regardless of the fact that
7 Kirst falls within a category specifically exempted from the exclusion rule, Respondent's have failed
8 to show how Kirst's presence at the hearing and communication with witnesses would show
9 prejudice.

10 III. Conclusion

11 The Securities Division objects the Respondent's Motion to Preclude and Prohibit. The
12 ALJ already granted Respondent's request to exclude witnesses but allowed Kirst to remain
13 present. The ALJ's granting Respondent's request to exclude witnesses while making an
14 exception for Kirst is a permissible exercise of the ALJ's discretion in applying rules of evidence
15 in accordance with governing laws. Ample case law exists where investigators, like Kirst, were
16 permitted to remain present during an adverse proceeding despite the fact that a request was made
17 to exclude witnesses and despite the fact that the investigator would be called as a witness.
18 Finally, Respondent's have failed to show any prejudice from the ALJ permitting Kirst to be
19 present at this hearing. For the foregoing reasons, the Securities Division objects and requests that
20 the Motion to Preclude and Prohibit be dismissed.

21
22 RESPECTFULLY SUBMITTED this 11th day of April, 2005.

23
24 By



25 Jamie Palfai

26 Mark Dinell

Attorneys for the Securities Division of the
Arizona Corporation Commission

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 11th day of April, 2005, with

3 Docket Control
4 Arizona Corporation Commission
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7
8 COPY of the foregoing hand-delivered this
9 11th day of April, 2005, to:

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